In the Supreme Court of the United States.

OCTOBER TERM, 1902.

KNOXVILLE WATER COMPANY, Plaintiff in Error,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE.

No. 212.

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

This action was brought by the Mayor and Aldermen of the City of Knoxville, Tenn., a municipal corporation, hereinafter called the City, against the Knoxville Water Company, a domestic corporation, chartered to furnish water to said City and its inhabitants, hereinafter called the Water Company, to recover the prescribed penalty for the violation of an ordinance of said City, by charging a private consumer a higher rate for water than that fixed by said ordinance. The Water Company admits the violation of the ordinance, but insists, by way of defense, that the ordinance is void.

Divers objections were made to the validity of this ordinance. All of these objections were overruled by the Supreme Court of the State and the ordinance sustained in every particular. The

Water Company has proscuted writ of error. Most of these objections involved no Federal question, and as to objections of this character the decision of the Supreme Court of the State is conclusive and not subject to review on this writ of error.

The objections to the validity of this ordinance, which present Federal questions that may be reviewed by this Court on writ of error, are:

(1) That the ordinance impairs the obligation of certain contracts between the City and the Water Company, in contravention of Sec. 10, Art. I., of the Constitution of the United States.

The contention on this point is that the City had, before the passage of said ordinance, contracted with the Water Company to relinquish its right to regulate the rates and charges of the Water Company for water furnished to the inhabitants of said City.

(2) That said ordinance deprives the Water Company of its property and liberty without due process of law.

The contention on this point is that the rates fixed by the ordinance were unreasonable, confiscatory and oppressive; that they were fixed arbitrarily, without previous investigation and without notice to the Water Company, and that they were intended by the City to depreciate the value of the plant, in order to enable the City to purchase it at an inadequate price under an option reserved in the contract. It is likewise insisted that the ordinance in question interferes with the contracts of the Water Company with its consumers.

It is proper to state that this second objection to the validity of the ordinance was not seriously pressed in the State Court.

The defense that the rates fixed by the ordinance were unreasonable, oppressive and confiscatory was waived and abandoned by the Water Company, no evidence offered in support of it, and by consent of the Water Company pre-termitted in the decision of the Supreme Court of the State.

See Opinion of the Supreme Court, Rec. pp. 221-7.

It was likewise conceded in the State Supreme Court in the brief of counsel that the existing rates of the Water Company

were only "slightly" in excess of the rates and charges prescribed by said ordinance, and that some of them were even lower than the rates prescribed by the City ordinance in question.

Record, p. 184.

Again, it is said in the brief that the difference between the rates of the two schedules "is very small."

Record, p. 196.

These concessions refute the charge, which is sustained by no evidence whatever, that it is the purpose of the City to depreciate the value of the water plant in order to avail itself of the right to purchase under its option, at an inadequate price.

The insistence that the ordinance interferes with the Water Company's contracts with its customers in such a way as to impair them, if such insistence were material, is wholly unfounded. These contracts, some of which are set out in the record, are mere applications on the part of the consumers, signed alone by the consumer, to obtain water and pay for the same "in accordance with the rates, rules and regulations of the Knoxville Water Company, as *now or hereafter in force,* and which are made a part of this contract." These contracts run only for one year and that period had expired.

Record, p. 185.

The Water Company could not, even had it undertaken to do so, have deprived the City of the power to regulate water rates by making contracts with its customers inconsistent with that right, but it has not undertaken to do this, as appears from the contracts themselves.

These contracts provide on their face for the adjustment of future charges and for changes in the rates. There is no proof in the record to show that the City did not make full inquiry before passing said ordinance, or that it did not give the Water Company full opportunity to be heard. But this is, as the State Court holds, wholly immaterial, as the Water Company had the right in this or another proceeding, to have full investigation of the question of the reasonableness of the rates prescribed by the ordinance

after it had been passed and gone into effect. Besides, the Water Company concedes in this proceeding the reasonableness of the prescribed rates by waiving any inquiry upon that question, and by admitting that they are substantially the same as its own rates, in its general effect upon its earnings and income. So that it appears that the decision in this case must turn mainly upon the question whether the City had by valid contract made before the passage of said ordinance with the Water Company, relinquished its right to regulate the rates and charges to be made by the Water Company for water furnished the inhabitants of said City.

The Water Company's position is that the City possesses no right of regulation, however reasonable or necessary that regulation may be. The City's contention is that it has the power, which has never been relinquished by contract or otherwise, to make reasonable and necessary regulation of the rates of said Company, for the protection of its inhabitants.

The essential facts bearing upon this question are these:

1st. The City of Knoxville had prior to 1882 been incorporated by special acts of the Legislature. For convenience such portions of all the statutes constituting the charter of said City as relate to this subject are presented in Appendix "A" to this brief and are therein set out in *haec verba* and in full.

2nd. The Knoxville Water Company in January, 1882, perfected its charter, granted, not by special act of the Legislature, which has been forbidden by constitutional provisions since 1870, but under a system of general incorporation laws that obtains in Tennessee.

The first and principal act constituting this system was passed in 1875.

See Session Acts 1875, Chap. 42.

This act was passed for the purpose of conforming the corporation laws of the State to the change made necessary by the Constitution of 1870, forbidding incorporation by special acts of the Legislature, and requiring the same to be done by and under general laws. This act classifies corporations with reference to their objects, and prescribes the method of obtaining charters,

defines the general powers of corporations, and sets out forms of charters for many classes of corporations. In this act, however, no provision was made for the incorporation of water companies. This omission was supplied by an amendment of the Act of 1875, passed March 27, 1877.

See Session Acts 1877, Chap. 104.

This latter act prescribes the form of charter for a water company for the first time. It confers upon such companies the general powers prescribed by the Act of 1875. Among other things which are made parts of its charter, or conditions upon which such charter may be granted and such company operated, are the following: "The Company shall have power and is hereby authorized to bring into said city, town or village, a sufficient supply of water by means of pipes, or tanks, or in any other way, and to construct reservoirs for the reception thereof, and to supply with water the inhabitants of said city, town or village, and to the environs thereof, and to all who may be along the line of said Company's pipes, and to erect hydrants or fire-plugs within said town, city or village, and to contract with said inhabitants and with the corporate authorities of said town, city or village, or any incorporated companies for the use of said water, and to charge such prices for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable regulations and rules respecting the use and waste of said water as the Directors of said Company may from time to time prescribe. * * * *Provided,* That nothing herein contained shall be construed to compel the inhabitants of said town, city or village to use the water so introduced by said Company, or to prevent them from using water obtained in any other way." These provisions are copied *verbatim* into the Water Company's charter.

Record, pp. 52, 53.

Again, Sec. 2 of said Act provides that "such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village in which it is proposed to operate such

waterworks, and such leave shall be certified by the Mayor or Recorder upon such application and registered with it. *And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of said city, town or village, and such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by such Company."*

The general incorporation statute of 1875, of which the Act of 1877 is amendatory, contains the following provisions: "By no implication or construction shall a corporation be deemed to possess any powers, except those hereby expressly given, or necessarily implied from the nature of the business for which the charter is granted, and by no inference whatever shall said corporation possess the power to discount notes," etc.

Session Acts of 1875, Chap. 142, p. 237.

The provisions of the general law are to be read into the face of the charter, whether written therein or not.

People vs. Chicago Gas. T. Co., 130 Ill., 268.

Again, "The right is reserved to repeal, annul or modify this charter. If it is repealed, or if the amendments proposed, being not merely auxiliary, but fundamental, be rejected by a vote representing more than one-half of the stock of the corporation, the corporation shall continue to exist for the purpose of winding up its affairs, but not entering upon any new business," etc.

Session Acts 1875, Chap. 142, p. 237.

The charter of the Knoxville Water Company, issued under and pursuant to these laws, will be found on pages 51-3 of the record, and embodies, either expressly or by necessary implication, all of the above provisions of the law authorizing its issuance. It purports to be a charter for the sole purpose of constructing waterworks in or near the City of Knoxville for the purpose of furnishing the corporate authorities and the inhabitants of said City and its environs with water.

3rd. On the 1st day of July, 1882, the Water Company entered into a contract with the City of Knoxville, consisting of divers stipulations on the part of the Water Company, embodied

in twelve paragraphs, and divers other stipulations on the part of the City.

Record, pp. 5-12.

Among other stipulations made by the Water Company in said contract are the following:

1st. To erect a water plant of sufficient capacity to supply the city and its inhabitants with water, and to maintain the same for a period of thirty years from the 1st day of January, 1883.

2nd. "Said Company will supply private consumers with water at a rate not exceeding 5 cents per 1,000 gallons, provided, however, which is expressly understood, that the entire cost of introducing from the mains into the private premises, including the cost of meter when used, shall be borne by the parties introducing or ordering the same, and that no main or distributing pipe shall be tapped by any person except a plumber licensed for said purpose by said Company."

The City on its part contracted and agreed to give to the Water Company the use of the streets, lanes, alleys, public squares, etc., for the purpose of laying pipes, mains, etc., and making repairs, and to pass such penal ordinances as would protect the Water Company in the enjoyment of its franchise.

The City likewise contracted and agreed to pay a rental for 75 hydrants at the rate of $50.00 per annum, and $50.00 each for such additional hydrants as might be required, and to pay the hydrant rental for water to be furnished the City for its own use through said hydrants.

The City likewise obligated itself not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville or the privilege of entering upon the public streets, lanes or alleys or other public grounds, for the purpose of furnishing said City or the inhabitants thereof with water, for the full period of thirty years from the 1st day of August, A. D. 1883, provided the Company complied with the requirements imposed and assumed by it under and by virtue of this agreement.

Record, p. 9.

This last provision is forbidden by the Act of 1885 and not authorized by any previous legislation. There was likewise a mutual stipulation in this contract, by which the City of Knoxville reserved the right, or option, to purchase the Water Company's plant, after the expiration of fifteen years, upon a notice of one year, at a price to be agreed upon by the parties, or, in case of failure to agree, to be fixed by arbitration.

These are the material portions of said contract, so far as it relates to the question under consideration.

4th. After the contract of July, 1882, under which the Water Company constructed its plant and operated it for some years, and before the contract of 1899, to be hereinafter stated, was made, the Water Company had acquired or contracted for other water plants, occupying adjacent territory, and this territory had been admitted within the corporate limits of the City of Knoxville.

These water plants were:

(1) The North Knoxville plant, erected by Wheeler & Parks, under a contract with that municipality, the stipulations of which contract were similar in all material respects to those of the contract between the City of Knoxville and the Knoxville Water Company, already stated. This contract provided that water should be furnished the City of North Knoxville, for its use, upon the payment of certain hydrant rentals, and to its inhabitants and suburbs, upon no less favorable terms than shall from time to time govern its use in the City of Knoxville.

The 9th section of this contract provides that "water to be furnished private customers shall be charged for at not exceeding the rates contained in the following schedule." Then follows an extensive schedule of annual rates for water furnished by fixtures and by meters. It is further provided in said contract that the Water Company shall furnish water, "subject to all reasonable requirements of the Town Council of North Knoxville."

Record, p. 70.

There was a provision likewise that these works should be constructed and operated by a company to be chartered under the laws of the State of Tennessee.

Record, pp. 70-78.

In 1893 this contract was assigned by Wheeler & Parks to the Knoxville Water Company. The latter Company assumed all of its obligations. It runs until January 2, 1913.

(2) The Lonsdale-Beaumont Water Company was constructed and operated under a contract with the municipality of West Knoxville. The charter of this Company was issued in 1891, and is substantially the same as that of the Knoxville Water Company.

Record, pp. 57-60.

The contract between this Company and the City of West Knoxville was made September 17, 1892, and is substantially the same as that made between Wheeler & Parks with the City of North Knoxville.

Record, pp. 62-70.

It provides on the subject of rates to be charged consumers, other than the municipality, for water, as follows:

"SEC. XI. The said Grantees shall not charge consumers, during the continuance of the franchise granted by this ordinance, exceeding the following maximum rates, these rates, however, to be subject to 10 per cent. discount on bills made except those where water is metered, or used for fire protection, mechanical or manufacturing purposes, if settled within ten days of their date."

Then follows a schedule of annual rates upon fixtures and meters. This contract runs twenty years from its date. This Company was purchased by the Knoxville Water Company, under proceedings to be hereinafter stated.

The statute authorizing the purchase of one water company by another, or their consolidation, is made Appendix "B" hereto. It provides, among other things, that the purchasing company shall hold the plant and property purchased "as a part of its corporate property, the same to be held, owned and enjoyed and operated by the purchasing company, under its own charter, just as if it had originally built or acquired said property under its own charter."

Session Acts of 1889, Chap. 166.

It is proper to state in this connection that the Cities of Knoxville, North Knoxville and West Knoxville were consolidated by an Act passed in 1897.

Session Acts, 1897, Chap. 323.

By the terms of this consolidation Act the new City of Knoxville assumed the obligations of North and West Knoxville, and it is provided that the City of Knoxville shall have the benefit of all contracts made with the cities of North and West Knoxville, and the right to enforce the same, and that the restrictions, obligations and limitations upon persons and corporations, holding franchises and privileges from any of the consolidated municipalities, shall not be in any respect affected by the consolidation, but shall remain in all respects as before consolidation, with the right of the consolidated municipality to enforce the same.

5th. On October 20, 1899, the City of Knoxville passed an ordinance, consenting to the acquisition of the Lonsdale-Beaumont water plant by the Knoxville Water Company, and released the latter Company from a bond limit of $150,000, imposed by the original contract, and made other additional stipulations.

Record, pp. 13-17.

This ordinance was accepted by the Knoxville Water Company and the Lonsdale-Beaumont Water Company, and thereby the property of the Lonsdale-Beaumont Water Company became the property of the Knoxville Water Company. This contract made no change in the former contracts relating to water rates or their regualtion, but provided expressly for their maintenance in these words: "Provided always that said Knoxville Water Company shall furnish to the people living in what is now the Tenth Ward of the City of Knoxville (being the territory formerly known as the territory of West Knoxville), as well as those who may hereafter live in said territory, clear, good and wholesome water, free from all sewage and other contamination, equal in quality to that now supplied by the Knoxville Water Company to the City of Knoxville, and at a maximum rate not exceeding that fixed in the ordinance and contract of September 17, 1892, being the contract between the Lonsdale-Beaumont Water Company and

the Town Council of West Knoxville, and shall keep up the pressure provided for in said contract and ordinance, and shall in all other respects maintain and carry out the provisions of said contract unimpaired, except as modified in this ordinance."

And it further provided that "said consolidated Knoxville Water Company, succeeding as aforesaid, to all the rights, priviliges and franchises of both Companies, shall also furnish to the people living in the remaining wards of the City of Knoxville, other than said Tenth Ward, or who may hereafter live in said remaining wards, or such wards as may be hereafter added to the City of Knoxville, filtered and wholesome water, or water equal in quality to the filtered water now being furnished by said Knoxville Water Company, at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the City of Knoxville, dated July 1, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company."

6th. On the subject of water rates the City and the Water Company have taken respectively the following action:

(a) It does not appear what action was taken by either party prior to 1895, or what rates prevailed prior to that date.

(b) On April 1st, 1895, the Water Company promulgated a "Schedule of Annual Rates for the Use of Water," found on pages 87-96 of the record.

Under this schedule it will be observed that by far the greater number of customers are required to pay for water by fixture charges, and not by the gallon. No change of the rates has been made by the Water Company since 1895.

By this schedule the Water Company reserved "the right to attach a meter to any service at its option, and in lieu of the above rates (meaning fixture rates) to charge the following: A graduated scale of meter rates is then set out. Then follows this provision: "Provided that the minimum meter charge shall not be less than $10.00 per annum and meter rent." Meter rent is then fixed at two dollars per annum for domestic services.

Thus it appears that the Water Company assumed and re-

served this supposed right, at its sole option, to arbitrarily transfer all customers having the right under this schedule to water at fixture rates, ranging from $2.00 to $2.50, $5.00 and $8.00 and upwards per annum, payable quarterly, to a meter rate of at least $12.00 per annum, payable monthly.

(c) On the 17th day of May, 1895, the City, in the exercise of its power to regulate the Water Company's action in furnishing water to consumers, passed an ordinance the purpose of which was to correct the inequalities and hardships of said schedule of April 1, 1895. This ordinance contained the following important provisions:

(1) That any private water consumer was entitled, upon his own option, to have the Water Company furnish him water service by measurement through and by a meter.

(2) It fixed maximum meter rates to customers, the same as in the Water Company's schedule of April 1, 1895, but made the bills payable at the end of the month, instead of in advance, and subjected them to a discount of 10 per cent. if paid on or before the 10th of the succeeding month.

(3) The Water Company is not authorized or permitted, as it undertakes to do in its said schedule, to substitute arbitrarily a fixture rate by a much more burdensome meter rate.

It is clear from this ordinance that the City in 1895 understood that it had the right and power to regulate the rates charged by the Water Company, and that it undertook to exercise the power of regulating both the price of water to be furnished private consumers, and the manner in which it should be furnished by the Water Company.

(d) On the 30th day of March, 1901, the City passed the ordinance whose validity is assailed in this case. This ordinance, as counsel for the Water Company concedes, makes only "slight," or "very small" reduction of rates—in fact, increasing some of them.

For a period of six years there had been no readjustment of rates. The Water Company had in the meantime extended its operations by the acquisition of the competing plant of the Lons-

dale-Beaumont Water Company. Its business had increased to 4,500 or 4,600 private consumers. The City had grown rapidly in population, having by the Census of 1890 22,535 inhabitants and by the census of 1900 33,627 inhabitants. The rates charged by the Water Company were not uniform over the City, and in some respects, notably meter rates, were arbitrary. These facts were deemed sufficient to authorize a "slight," or "very small" reduction in rates, which the Water Company had deemed satisfactory six years before.

This ordinance adopts, in the main, the classification of the former schedule, but equalizes rates over the city and rescues the customer from the arbitrary action of the Water Company, which, if its present contention is correct, may, at its option, double the rates of 1895. It prescribes a penalty of not less than $10 nor more than $50 for its violation. This is the penalty sued for in this case.

(7) The Supreme Court of the State of Tennessee sustained said ordinance, holding that the Legislature of the State has the power to regulate the charges of public utilities, such as water companies, and the right to delegate such power to municipalities; and that such power of regulation had been conferred by statute upon the City in this case, and in effect that neither the City nor the Water Company were authorized under the laws of the State and their respective charters to make any contract in derogation or limitation of this power of the City; and that in fact no such contract had been made between the City and the Water Company. The Court likewise held that the power of regulation was a continuing one, which was not exhausted by a single exercise of that power.

II.

ARGUMENT.

(1) The decision of the Supreme Court of the State sustaining said ordinance of March 30, 1901, and holding that it did not violate the obligation of any contract between the City and the Water Company, is correct.

The State had undoubted power to regulate the rates of the Water Company by statute. It was clearly competent for it to delegate that power to the City. The statutes of the State have, in unmistakable terms, delegated to municipalities the power to regulate by ordinance, the price of water to be furnished to the inhabitants of a city by water companies. Under the statutes and the respective charters of the City and the Water Company neither the City nor the Water Company had the power to enter into any valid contract, in derogation or limitation of the City's power to regulate the rates of the Water Company. And upon a consideration of the alleged contracts and ordinances, relied upon by the Water Company as constituting such contract, it is clear that the City did not in fact, enter into any contract in derogation or limitation of its right to regulate the prices of the Water Company. And, whatever contract was made, was revocable.

It has been settled that the State, by direct enactment of its Legislature, or by authority delegated by the Legislature to counties or municipalities, may regulate public utilities and the rates to be charged by corporations or individuals, rendering any service to the public. This doctrine has been applied to elevators, telephones, gas companies, water companies, and other public and *quasi public* servants.

Munn vs. Warehouses, 94 U. S., 133.

R. R. Commission Cases, 116 U. S., 307, 347-352.

Spring Valley Water Works vs. Schlotter, 110 U. S., 347.

Turnpike Co. vs. Crcxton, (Ky.) 33 L. R. A., 177 and Note.

San Diego Water Co. vs. San Diego, (Cal.) 62 Am. State Reports, 261 and Note.

Danville vs. Danville Water Co., (Ill.) 69 Am. State Reports, 304.

Rogers Park Water Co. vs. Fergus, (Ill.) 69 Am. State Reports, 315.

The authority of the City to regulate the rates of the Water Company is found in the general incorporation act of the State under which the Water Company obtained its charter, in these words: "And this Act (meaning this statute) is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, *and such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by such company.*"

Session Acts of 1877, Ch. 104, Sec. 2.

Thus is appears that the right of the City to regulate the rates of this Company must be treated as if written into the face of its charter, and as a condition of its existence.

People vs. Chicago Gas Co., 130 Ill., 268.

K. of P. vs. Wells, 93 Tenn., 605.

Central Trans. Co. vs. Pullman Palace Car Co., 139 U. S., 24.

In order that any contract between the City and the Water Company, in restraint or limitation of the City's power to regulate water rates shall be valid, such contract must be within the corporate powers of both corporations.

Central Trans. Co. vs. Pullman Palace Car Co., 139 U. S., 24.

Thomas vs. R. R. Co., 130 U. S., 30. 32 Lawyer's Edition, 843.

R. R. Co. vs. R. R. Co., 118 U. S., 297. 30 Lawyer's Edition, 176.

R. R. Co. vs. R. R. Co., 130 U. S., 26. 32 Lawyer's Edition, 842.

So that the alleged contract relied upon by the Water Company in this case is invalid, if either the City or the Water Company was not authorized by its charter or the laws of the State to make it, and, *a fortiore*, it is invalid if forbidden by positive provision of the law.

"A contract of a corporation, which is *ultra vires* in a proper

sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it, * * * but when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other parties to the contract, can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

Central Trans. Co. vs. Pullman Palace Car Co., 139 U. S., 24. 35 Lawyer's Edition, 681.

In the case quoted, after an examination and analysis of the former decisions of this Court, Mr. Justice Gray sums up thus: "The charter of a corporation, read in the light of any general laws, which are applicable, is the measure of its powers, and the enumeration of those powers, implies the exclusion of all others, not fairly incidental. All contracts made by a corporation beyond the scope of those powers, are unlawful and void, and no action can be maintained upon them in the Courts, and this upon three different grounds—the obligation of every one contracting with a corporation to take notice of the legal limit of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and above all the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

Idem, p. 64 of Lawyer's Ed.

Certain rules for the construction of charters and of corporation laws are well settled.

In Thomas vs. R. R. Co., 101 U. S., 82,

It is said: "The power of corporations organized under legislative statutes are such, and such only, as those statutes confer."

Cited with approval in *Central Trans. Co. vs. Pullman Palace Car Co., supra.*

Perrine vs. Canal Co., 9 Howard, 184.

Cass vs. Manchester Iron & Steel Co., 9 Fed. Rep., 640.

Danville vs. Danville Water Co., (Ill.) 69 Am. State Reports, p. 304.

This principle is embodied in the general incorporation laws of the State of Tennessee, under which, or in amendment of which, the Water Company's charter was issued, in these words: "By no implication or construction shall a corporation be deemed to possess any powers, except those hereby expressly given, or necessarily implied from the nature of the business for which the charter is granted," etc.

Session Acts, 1875, Ch. 142, Sec. 5, p. 237.

Again, it is said in *Central Trans. Co. vs. Pullman Palace Car Co., supra,* that "by a familiar rule, every public grant of property or franchises or privileges, if ambiguous, is to be construed against the grantee and in favor of the public, because the intention on the part of the government to grant to private persons, or to a particular corporation, property or rights, in which the whole public is interested, cannot be presumed, unless unequivocally expressed, or necessarily to be implied in the terms of the grant, and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or his agents, and therefore the words used are to be treated as those of the grantee. And this rule of construction is a wholesome safe-guard of the interests of the public against any attempt of the grantee by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. (Citing cases.) * * * This rule applies with peculiar force to articles of association, which are framed under general laws, and which are substituted for a legislative charter, and assume to define the powers of a corporation, by a mere act of the associates, without any supervision of the Legislature or of any public authority."

See *Ross-Meacham Brake Co. vs. Southern etc. Co., 72 Fed.*

Rep., 958, construing the general incorporation laws of the State of Tennessee.

Bearing these principles in mind, we proceed to inquire whether the City of Knoxville had, under its charter and the laws of the State, the power to surrender by irrevocable contract with the Water Company, its right and authority to regulate the rates and prices of water to be furnished to the inhabitants of the City.

This question must be determined from a consideration of the charter acts of said City, and such general laws, if any, as are applicable to the subject. "Apart from the few faculties incident to the existence of a municipal corporation, such as the corporation's right to sue and be sued and have a common seal, it has no power to do any act, except such as is essential to the plain purpose of its creation, or is authorized by the express provisions of its charter, or by a clear or necessary implication therefrom. Powers will not be implied simply because they may be convenient, but they must be indispensable, and any fair or reasonable doubt concerning the existence of any power is resovled against such croporation."

In Re Lee Tong, 18 Fed. Rep., 253.

Scott's Exctrs. vs. Shreveport, 20 Fed. Rep., 714.

Los Angeles City Water Co. vs. Los Angeles, 88 Fed. Rep., 720.

The City of Knoxville was chartered by special act of the Legislature, and there are no general statutes bearing on the question of its powers.

The charter acts, so far as pertinent to this inquiry, are fully set out in Appendix "A" to this brief. The original charter Act of 1815 contained no provision on the subject of a water supply for the City or its inhabitants. At that date Knoxville was a village, having abundant water supply for its inhabitants in its numerous springs, cisterns, creeks, and the Tennessee River. Not until 1838 was any provision made by law in regard to a water supply for said city and its inhabitants. In an amendment of its charter of that date, the City was authorized to borrow money, not exceeding $50,000, for the purpose of erecting waterworks,

and supplying the town with water, and to issue bonds and script of the corporation for that purpose. This statute manifestly contemplated the erection of waterworks by the City itself, and did not authorize the making of any contract with any independent company for that purpose. No other legislation on this subject occurred until 1866, when, by another amendment of the City charter, the Mayor and Aldermen of the City of Knoxville were "invested with all the rights, authorities and privileges that had been theretofore conferred by law upon the City of Nashville."

Looking to the statutes incorporating the City of Nashville, enacted prior to 1866, we find that City had been empowered to receive and hold property, real and personal, to be used for the erection of waterworks and other purposes; and had been likewise empowered to provide the City with water by waterworks, within or beyond the boundaries of the City, and to provide for the prevention and extinguishment of fires, and to organize and establish fire companies.

These were the only powers conferred upon the City of Knoxville by the statute of 1866, incorporating into its charter the powers, etc., of the City of Nashville. It is manifest that the City of Nashville, and as a consequence, the City of Knoxville, had no other powers with reference to a water supply, under these statutes and provisions, than to acquire property for the erection of waterworks, and to erect them by the direct act of the City. There is no intimation of a power to enter into a contract for that purpose with an independent company.

These were the charter powers and the only powers on this subject possessed by the City of Knoxville in 1882, when it entered into the contract with the Knoxville Water Company, the obligation of which, it is insisted, has been violated by the City ordinance of March 30, 1901, and hence the authority for the making of that contract by the City, if any such authority existed at all, must be found in the Act of 1877, amending the general incorporation laws of the State, (and not relating to the subject of municipal corporations,) under which the Water Company obtained its charter. This Act will be noticed in another connection.

By the Act of 1885, passed subsequent to the making of said contract of 1882, the powers of the City of Knoxville with reference to its water supply were somewhat enlarged. That Act provides, as did former Acts on the same subject, that the City might purchase, receive and hold property, real and personal, within or beyond the boundaries of the City, to be used for the erection of waterworks, etc. It likewise provided that the City should have the power to provide itself with water by waterworks, within or beyond the boundaries of the City, "or provide for supplying the City with water otherwise." The clause above quoted, to-wit: "or provide for supplying the City with water otherwise," is the only authority contained in this Act under which the City can be authorized to contract with an independent company for a water supply. Whether this clause means that the City may provide a water supply otherwise than by waterworks, or that it may provide for a water supply otherwise than by the erection of such works by itself, may admit of doubt. However, it may be treated, for the purpose of this argument, as empowering the City to contract with an independent company for a water supply, although it does not so state in terms. The Act likewise authorizes the City to condemn property for waterworks purposes, but forbids the granting of the exclusive use of its streets for any purpose, to any one person, company or corporation. This Act was in force when the contract between the City and the Water Company, embodied in the ordinance passed by the City in 1899, was made.

Giving this statute the fullest scope that can be insisted upon by the Water Company, it does no more than to authorize the City to contract with an independent company for supplying the City and its inhabitants with water. It contains no reference to the subject of water rates, and authorizes the making of no contract on that subject, but if it shall be treated as authorizing the City to contract with reference to water rates, it falls even then far short of giving the City the authority to surrender the power to regulate those rates. In order to sustain the Water Company's contention that it has an irrevocable contract, the obligation of

which is violated by the ordinance of March 30, 1901, regulating the rates that it may charge to the inhabitants of the City for water, there must be found authority in the charter acts of the City, or elsewhere, for the City to contract, not only for the erection of waterworks and the making of a contract with reference to rates, but the power in addition to exempt the Water Company from the City's regulation of those rates. The power to contract rates is a different thing from the power to surrender proper, reasonable and necessary regulation of those rates. There is not an intimation of any such power in any of the charter acts of the City of Knoxville, and any such contract, even if made, would be, as to the City, *ultra vires* and void.

The power of the State and of its municipalities to regulate water rates is a governmental function, essential to the protection of the citizens, and the power of the municipality to surrender such function and abandon its citizens to the arbitrary action of the Water Company must be conferred in clear and explicit terms, or it cannot be held to exist. The surrender of such a power is in the nature of an exemption from taxation, and not favored by the law. As was said by Mr. Justice Shiras, delivering the opinion of the Court in *R. R. vs. Kentucky, 183 U. S., 517:* "It is scarcely necessary to argue or to cite authority for the proposition that a contract of exemption from future general legislation, either by a constitutional provision or by an act of the Legislature, cannot be deemed to exist, unless given expressly, or unless it follows by an implication, equally clear with express words."

In the *R. R. Commission Cases, 116 U. S., 307; 29 Lawyer's Ed., 636,* Chief Justice Wait, delivering the opinion of the Court, uses this language, on this subject:

"This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, *in Providence Bank vs. Billings, 4 Peters, 514-66,*

'its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.' This rule is elementary and the cases in our reports where it has been considered and applied are numerous."

This language was quoted with approval in *Freeport Water Co. vs. Freeport, 180 U. S., 599; 45 Lawyer's Ed., 688.*

Mr. Justice White, in his dissenting opinion in the last named case, says: "It is unquestioned also, that where a right asserted, if enforced, will put a contractual limitation upon the power of the lawmaking authority of the State, presumably to be exercised for the public benefit, doubt is to be resolved in favor of the continued existence of the lawmaking power. In other words, that no contract limitation on the powers of government can be upheld by mere implication, or sustained if there be doubt on the subject. The existence of such a contract limitation must arise clearly and by such express intendment."

In the case at bar the authority of the City to contract with the Water Company is much more limited than the power conferred for that purpose upon the cities and villages of Illinois, by the statutes of that State, considered by this Court in the several cases reported in *180 U. S.*, and held by the majority of the Court insufficient to authorize cities to make an irrevocable contract with a water company with reference to water rates for a period of thirty years.

Under the statutes of Illinois construed in those cases, the cities and villages were authorized to contract with incorporated companies for a supply of water for public use, at such rates as might be fixed by ordinance, and for a period not exceeding thirty years. By another section of the Act, which is a distinguishing feature of those cases, the city or village so contracting with the water company was authorized to levy and collect a tax, upon all taxable property, within such city or village, to pay for the water so supplied.

See Freeport Water Co. vs. Freeport, 180 U. S., 587-618. 45 Lawyer's Edition, p. 679.
Danville vs. Danville Water Co., 180 U. S., 619-24. 45 Lawyer's Edition, p. 696.

In the case of *Rogers Park Water Co. vs. Fergus, 180 U. S., 624-33*, this Court, in construing an ordinance which provided that the water company "shall charge the following annual rate to consumers of water, during the existence of this franchise," held that such a provision was a mere regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise.

It will be observed in these Illinois cases the Court construed statutes or ordinances, in which there was an express provision on the subject of water rates, or on the subject of contracting or fixing water rates, while there is no such provision at all in any of the cases chartering the City of Knoxville.

See likewise Turnpike Co. vs. Croxton, (Ky.) 23 L. R. A., 177 and Notes.

Danville vs. Danville Water Co., 69 Am. St. Rep., 304.

Rogers Park Water Co. vs. Fergus, 178 Ill., 571.

San Diego Water Co. vs. San Diego, (Cal.) 62 Am. State Rep., 261.

The Supreme Court of the State of Tennessee has construed the provisions of the charter of the City of Knoxville as conferring no authority for making an irrevocable contract by the City with the Water Company, and while this decision is not conclusive upon this Court, it will be given great weight, where, as in this case, there must be, to say the least of it, great doubt as to the existence of the power, contended for by the Water Company.

R. R. Co. vs. Ky., 183 U. S., 503. 46 Lawyer's Ed., 298.

Williams vs. Gaylord, 186 U. S., 157. 46 Lawyer's Edition, 1102.

It is not material to inquire as to the powers of the cities of North Knoxville and West Knoxville to contract with the water companies, inasmuch as the statutes under which those companies became incorporated with, or the property of the Knoxville Water Company, provides that the property and working franchises of those companies, including its realty, its pipes, connections, engines, pumps, and all else that pertains to those companies, shall be held, owned, enjoyed and operated by the Knoxville Water

Company, "under its own charter, just as if it had originally built or acquired said property under its own charter." But the charters of those municipalities will be found to be substantially the same in all material particulars as that of the City of Knoxville. Both of said corporations were consolidated with the City of Knoxville since that date. An exemption of this character, like an exemption from taxation, is personal to the grantee, and not transferable.

We shall next inquire as to the power of the Knoxville Water Company, under its charter and the laws of the State, to make a contract with the City of Knoxville, by the terms of which the City surrenders absolutely its right of regulation of the rates to be paid by consumers for water furnished by that company.

As already stated, the incorporation of private or *quasi* public companies by special acts of the Legislature has been forbidden by constitutional provision since 1870. The Knoxville Water Company was chartered under a system of general incorporation laws, consisting of the original Act passed in 1875, and amendments since made. There was no provision prior to the Act of 1877 authorizing the incorporation of water companies.

The Knoxville Water Company was incorporated in 1882, under the provisions of said Act of 1877, which was an amendment of the original Act of 1875, extending its general provisions to water companies. The powers of the Knoxville Water Company must be found in its charter, and in the provisions of these acts, and nowhere else.

These acts provide the forms of charters for the several classes of companies. The Water Company derives its rights and franchise from this legislation, and must accept and hold them subject to the limitations and restrictions imposed upon the grant by the statutes. The State is at liberty to create and grant corporate franchises or to refuse to do so. If it chooses to create them, the State is at liberty to grant such rights and powers, and only such, as in its wisdom it chooses to grant, and to impose such limitations and restrictions as it chooses to impose. No citizen is under obligation to accept a corporate franchise, or to invest his

money upon the faith of such franchise, but if he voluntarily does so, he must accept it and exercise it under the limitations and restrictions imposed by the law making the grant. He cannot complain of the hardship or even the unreasonableness of such restrictions or limitations, for he is at liberty to accept or reject the franchise in the first place, and thereby to avoid the assumption of any of the obligations that the law imposes.

This Act of 1877, under which the Water Company obtained its charter, and exercises its franchises, requires a water company before, and as a condition to its erection of a water plant within a city, for the purpose of supplying a city and its inhabitants with water, to obtain the consent of the city to the use of its streets for that purpose. This is one of the conditions upon which it is allowed to erect and maintain its plant within the city. Another condition that is imposed is in these words: "And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by such company." It is thus made a condition of the existence of a water company proposing to erect a plant within a city and to supply the city and its inhabitants with water, that such grant shall not impair the police or general powers of the city authorities, and that the corporate authorities shall, notwithstanding such grant to the Water Company, have power by ordinance to regulate the price of water supplied by such company. In other words, a Water Company is forbidden by the Act under which it acquires its charter and its franchise, and all of its rights and powers, to exist or operate within a city except upon condition that the police and general powers of the city shall not be thereby impaired, and that the price of water that it shall furnish to the City and its inhabitants shall be subject to regulation by the corporate authorities.

Has such a corporation the power to make a contract with the City, in direct violation of this provision and condition, written by the law, into the face of its charter, and to accept a surrender from the City of the powers thus conferred in express terms upon

the City, in language too plain and explicit to admit of construction or doubt?

Such power as that conferred upon the City by this statute is held to be a *condition* of the privileges thereafter granted to a water company.

Freeport Water Co. vs. Freeport, 180 U. S., 587. 45 b Lawyer's Edition, 679.

It is worthy of note in this connection that this statute of 1877 confers upon the City, as well as upon the Water Company, the only authority that either had for making the contract of 1882.

It will be observed that the power here conferred upon the City is not to "fix," or "establish," or "prescribe," or "contract" water rates, but to "*regulate*" them. To "regulate" is "to adjust by rule, method, established mode; to direct by rule or restriction; to subject to governing principles or laws."—*Webster.*

In the case of *St. Louis vs. Western Union Tel. Co., 149 U. S., p. 469; 37 Lawyer's Edition, p. 813,* this Court, construing a charter provision of the City of St. Louis, conferring the power to open and establish streets, and to regulate their uses, etc., said:

"The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and inter-state commerce, and he who reads the many opinions of this Court will perceive how broad and comprehensive it has been held to be."

The use of this word indicates a purpose to confer large and ample powers upon the City for the protection of water consumers in the matter of rates. No other word, so appropriate, could have been used. The power to regulate is utterly inconsistent with and directly antagonistic to the power to make an unalterable contract, fixing specific rates. The power to regulate must, from its very nature, be a continuing one, in order to be effective, that may be called into exercise as often as changed conditions may require a readjustment of rates. From the nature of a water supply for a city, whose population is increasing, and whose demands for water are constantly growing, the power of regulation is a most important one.

It has been held in the construction of statutes and ordinances, authorizing a city or water company to fix or establish rates, that a single exercise of such a power does not preclude further exercise, upon proper occasion.

Osborne vs. San Diego Land & Town Co., 178 U. S., 22. 44 Lawyer's Edition, 962.

Freeport Water Co. vs. Freeport, 180 U. S., 587. 45 Lawyer's Edition, 679.

The purpose of the Legislature to confer ample power upon the City to regulate the price of water to be furnished by the Water Company to its inhabitants, and the necessity for such power, may be inferred from that provision of the charter act, and of the charter itself, authorizing the Water Company "to contract with said inhabitants and with the corporate authorities of said town, city or village, or with any incorporated companies, for the use of said water, and to charge such price for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations, respecting the use and waste of said water, as the directors of said company may from time to time prescribe."

It was doubtless in view of this provision authorizing the Water Company to contract, not with the City alone, but with its inhabitants singly that the Legislature, in a later provision of the Act, conferred upon the City, for the protection of its inhabitants, this ample power of regulation. In this respect the charter of the Water Company and the statute under which it was granted, differ materially from the Illinois statutes involved in the cases already cited.

The Illinois statutes provide that the contract for water supply should be made with the city, not with its inhabitants, and that the city should have the power to levy a tax upon the property of the city to pay for the same. Unless it had been clearly stated in the statute, it will not be presumed that the Legislature intended to turn over the inhabitants of the City to be dealt with singly and arbitrarily by the Water Company.

The question involved in the Illinois cases was the right of

the City to regulate the price of water contracted to be furnished to itself, upon the payment of stipulated hydrant rentals, and to reduce those rates below the price fixed in that contract. The Court was divided upon the question, but held that it was competent for the City to do so.

The ordinance under consideration in this case does not undertake to regulate or reduce the price of water furnished to the City, upon the hydrant rental contract, but simply to regulate the price of water furnished to its inhabitants.

An effort was made in the brief of counsel in the State Supreme Court to break the force of that provision of the statute of 1877, conferring upon the City power to regulate the price of water, by confining it to the preceding provision, as to the granting of leave by the City to the Water Company to operate its plant. It is difficult to understand how this would change the effect of this provision, as it would still remain a condition upon which leave to operate its plant was granted to the Water Company. The codifications of the Act by Milligan & Vertress, and by Mr. Shannon, are referred to, as changing the verbiage and meaning. Neither of these codifications is authoritative and neither of them was ever adopted by the Legislature of the State. The first was authorized, but rejected after it was made, and the latter is the work alone of an enterprising publisher. It is said that the word "Act," which is written with a capital "A" in the original statute, refers to the act of the corporation in granting leave, whereas, it is plain from a reading of the statute in the original session Acts that the word means "statute." This provision constitutes the last effective clause or sentence of the statute on the subject of water companies, and is a limitation upon all that precedes. Position is wholly immaterial.

Ferguson vs. Bank, 3 Sneed, 632.

In that case the language, "any company created by virtue of this Act," was held to embrace all of the companies named in the Act, although the provision in question was located in the middle of the Act, and after some of the companies and before others, the Court saying that the location of the provision was

not material. This limitation is coeval with, and a condition of, the very existence of a water company. It enters into its charter contract and every contract that it may make under its charter. The State Court was of opinion that the Water Company, as well as the City, was without authority to make any contract in restraint of the City's power of regulation, and this opinion construing a public statute of the State should have great weight.

Both the City and the Water Company have by their action assumed and conceded the existence of the right of regulation on the part of the City. The City by the ordinance of 1895 assumed and exercised the power of regulating meter rates, both as to the manner and the price of furnishing water through meters to consumers. It does not appear that the Water Company then or since that time contested the right of the City to enact that ordinance.

While the Water Company is authorized by its charter to contract with consumers, it has never assumed to make such contracts for a term longer than one year. This provision is found in its rules and regulations promulgated in 1895, and not since changed, to-wit: "All applications for the introduction and use of water must be entered upon the application book at the office of the Company, which is to be filled out, stating fully and truly the use to which the water is to be applied, and signed by the owner of the premises to be supplied, or a duly authorized agent, before the supply will be furnished; and said application shall constitute the contract between the Water Company and said owner for one year and to further bind said owner for this and such further time as the water shall be turned on, to pay the Water Company its established rates and to comply with all of its rules and regulations. At any time after the expiration of one year from the date of application, the water will be turned off at the option of the owner, on notice left at the office of the Company."

The charter of the Company provides that it shall not be compulsory upon the inhabitants of the City to take water furnished by the Water Company, and the law under which the Water Company's charter was granted further provides that if they do obtain

their water supply from the Water Company, the price to be paid by them shall be subject to regulation by the City. This right of regulation on the part of the City is one of the conditions or limitations upon the power of the Water Company to contract with consumers. The charter, as well as the law under which it was granted, seems to contemplate that the Company may contract with the City for the water to be furnished it, and with consumers individually for water to be furnished to them, but subject to an expressly conferred power upon the part of the City to regulate rates. The form of the contract made by the Water Company with consumers provides that the consumer shall agree to use and pay for water "in accordance with the rates, rules and regulations of the Knoxville Water Company, as now or hereafter in force, which is made a part of this contract." This contract is signed alone by the consumer. Thus it appears that the Water Company does not contract to furnish water, even for a single year, at the rates existing at the date of the contract, but reserves the power to furnish it at a different rate, if it shall voluntarily change its rates, or be required to do so by a regulation of the City.

The Supreme Court of the State, in holding that the City and the Water Company were not authorized to enter into any contract by which the City should be deprived of its power to regulate the price of water, has simply adopted the views that both the City and the Water Company entertained and acted upon. Thus it appears that neither the City nor the Water Company had the power under their respective charters or the laws of the State applicable thereto, to enter into any contract, even if they had undertaken to do so, in restraint or in derogation of the City's power to regulate water rates. It is sufficient to invalidate such a contract that either of the corporations was without power to make such a contract.

The question remains whether the City and the Water Company have entered into any contract by the terms of which, when properly construed, the City has surrendered or undertaken to surrender its power to regulate the price or rates of the Water Company, and if it has made, or undertaken to make such contract, whether the same is irrevocable.

The terms of the contract are to be gathered from the original contract of July 1, 1882, and the City ordinance of October 20, 1899, which was accepted by the Water Company, and incidentally from the contracts between North Knoxville and Wheeler & Parks, and West Knoxville and the Lonsdale-Beaumont Water Company. The material portions of these several contracts have already been hereinbefore set out. In each of these contracts were certain specific stipulations, relating to the supply of water to the City to be compensated by hydrant rental, at a fixed price per hydrant, and by the grant of the free use of the streets to the Water Company. Other and different provisions are contained in all of these contracts with reference to the supply of water to private consumers.

These provisions are as follows: In the contract of July 1, 1882, between the City of Knoxville and the Knoxville Water Company, it is provided that the Water Company "will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons."

Record, p. 7.

This, it should be borne in mind, is in form and in fact a stipulation on the part of the Water Company alone.

In the contract effected by the City ordinance, which was accepted by the Water Company, on the 20th of October, 1899, it was made a condition of the City's consent to the consolidation of the Water Company with the Lonsdale-Beaumont Water Company, that the Water Company should supply the inhabitants of West Knoxville with water of the stipulated quality "at a maximum rate not exceeding that fixed in the ordinance and contract of September 17, 1892, being the contract between the Lonsdale-Beaumont Water Company and the Town Council of West Knoxville." And further, that the Water Company should furnish water to the inhabitants of the City of Knoxville of the stipulated quality, "at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the City of Knoxville, dated July 1, 1882, and the schedule of rates and

charges now in force and operation by the Knoxville Water Company."

Record, p. 14.

As the Water Company holds and operates its entire plant, including North and West Knoxville, under its own charter, it is perhaps not material to inquire what rates prevailed in those municipalities before the acquisition of the North and West Knoxville plants by the Water Company. The consolidation Act requires the Water Company to take and hold the property of the plants that it consolidates with its own, and to operate the same, as if they had been constructed and were being operated under its own charter.

Acts 1889, Chap.——. See Appendix.

Moreover, the exemption from regulation is not transferable without express authority, even where it clearly exists.

St. L. & C. Co. vs. Gill, 156 U. S., 656-7. 39 L. Ed., 570.

Morgan vs. Louisiana, 93 U. S., 217. 23 L. Ed., 860.

Wilson vs. Gaines, 103 U. S., 417. 26 L. Ed., 401.

Railroad vs. Miller, 114 U. S., 176. 29 L. Ed., 121.

Covington vs. Sandford, 164 U. S., 578. 41 L. Ed., 564.

However, the contract between Wheeler & Parks and North Knoxville provided that that plant should be constructed under a charter to be obtained under the same law as that of the Water Company. The contract provided that the consumers of water in that municipality should be charged for water at a rate "not exceeding the rates contained in the following schedule;" then follows a schedule of annual rates for both fixtures and meters. It is further provided in this contract that water shall be furnished "subject to all reasonable requirements of the Town Council of North Knoxville," and upon no less favorable terms than shall from time to time govern its use in the City of Knoxville.

The contract between West Knoxville and the Lonsdale-Beaumont Water Company, of September 17, 1892, provides that private consumers shall not be charged for water furnished "exceeding the following maximum annual rates, — these rates, how-

ever, to be subject to 10 per cent. discount on all bills made, except those where water is metered or used for fire protection, mechanical or manufacturing purposes, if settled within ten days of their date." Then follows a schedule of annual rates for fixtures and meters.

Record, p. 66.

From these provisions it appears that the parties have not stipulated or undertaken to stipulate for anything more than a maximum rate for water to be furnished to private consumers. The question for determination is whether such a stipulation constitutes an irrevocable contract with the Water Company that it shall have the right to charge that rate, free from regulation by the City, however just or necessary that regulation may become, for the full term of its charter existence of thirty years.

In ascertaining the true meaning and effect of these several provisions, it is well settled both by Federal and State decisions, that the strictest rule of construction in favor of the City and against the Water Company should be adopted.

Ga. R. R. & Banking Co. vs. Smith, 128 U. S., 174. 32 Lawyer's Edition, 378.

Stone vs. Farmer's Loan & Trust Co., 116 U. S., 325. 29 Lawyer's Edition, 642.

Street Railway Co. vs. Africa, 100 Tenn., 44.

Turnpike Co. vs. Montgomery County, 100 Tenn., 421.

In the construction of such contracts, all doubts are to be resolved in favor of the public, and this rule applies with equal force, whether the contract is made directly with the State, or with a municipality, to whom the power to make such contract has been delegated by the Legislature.

It must be presumed in construing these provisions that each corporation was cognizant not only of its own powers and capacity to contract, but of those of the corporation with which it contracted. All persons contracting with a corporation must, at their peril, take notice of the powers and capacity of the corporation with which they contract. It must be likewise presumed that both corporations had in view these powers and capacities to contract,

and that they intended to make a legal contract within those powers and capacities. Much weight has been given to this fact in the cases construing contracts of this character, notably in the *Illinois Water Co. Cases, supra.*

Now at the dates of these contracts it must have been known to both corporations that the law and the charters of the contracting parties authorized, but did not command or require, as in the Illinois cases, the Water Company to contract with the City for water furnished to itself, and with the inhabitants for water furnished to them individually; that the inhabitants were not required to accept a water supply from the Water Company, but might get it from other sources, if they chose; that the right of the Water Company to furnish the inhabitants of the City with water was not an exclusive one, and that there was an express provision that the City should have the right to regulate the price of water to be furnished. These facts were before the minds of the contracting parties. Reading the contract in the light of these provisions of the law, it seems clear that they could not have intended, by fixing a maximum rate, to make an irrevocable agreement that the Water Company should have the right to charge for the full term of its existence, this rate, at its option, free from regulation by the City. The language of the contract does not purport to make or create any such contract. The rate fixed in the original contract of 1882, which is affirmed by the contract of 1899, was a maximum of five cents per 100 gallons. The schedule of rates adopted by the Water Company shows that by far the larger number of services were for water furnished at fixture rates, and not by the gallon. Treating it as a contract, this maximum could apply only where water was furnished by the gallon and through meters, and would not cover the whole subject of rates. There is no means provided of ascertaining the number of gallons furnished at fixture rates. This indicates the meaning and purpose of this provision.

It is to be observed, too, that under that contract the Water Company stipulates to furnish the City water by the hydrant, but without measurement, for certain hydrant rentals, while a differ-

ent provision is made as to private consumers. But even where a schedule is set out in the contracts or ordinances, it is a schedule of annual rates, which the Company itself fixes and in its rules and regulations reserves the right to change, even during the year for which it contracts to furnish water to private consumers.

Neither the City nor the Water Company has treated this fixing of a maximum rate as authorizing the Water Company to charge that rate, whether it be reasonable or not, and without regulation by the City. In the rates fixed by the Water Company, this maximum has never been insisted upon. The present rates of the Water Company are below this maximum. The City has been sparing and conservative in the exercise of its power to regulate the rates of this Water Company, but it has not hesitated to make such regulations when conditions seemed to warrant or require it.

As already stated, the City did, in 1895, when unjust meter rates were promulgated, proceed to exercise its power, and to correct the rates of the Water Company, and in so far as this record discloses, without protest on the part of the Water Company. And again, in 1901, when the Water Company had for six years maintained the same rates, and the population of the City, as well as the business and income of the Water Company, had greatly increased, the City passed an ordinance again regulating the rates of this Company, and slightly reducing them and equalizing them.

The original theory of the defense against this ordinance was that the ordinance was unreasonable, oppressive and confiscatory. But that was abandoned in the State Court. As already stated, the Water Company, in fixing a schedule of rates, has made them annual, not permanent, and in contracting with private consumers has limited the contract to a term of one year, and has reserved in its contracts for that term the right to change its rates and regulations. It has never had and does not now assume to have any permanent contracts with consumers, fixing rates for the full term of its existence. It has never undertaken to make any such contracts with private consumers.

Bearing in mind that this maximum rate is contained in the stipulations of the Water Company, and is a restraint upon its powers, and not upon those of the City, the meaning of this stipulation is clear. The Water Company, independent of any stipulation on the subject, would have the right to charge reasonable rates, thereby meaning such rates as would render a fair return to those who invested in the plant. By consenting to these maximum rates, it stipulates that it will furnish water to the inhabitants of the City of Knoxville at rates not exceeding the maximum, whether those rates shall prove remunerative to the Water Company or not. In other words, it agrees, on its part, that if higher rates should become necessary, to render the plant remunerative to its investors, that it relinquishes its right to increase the rates above this maximum limit.

In some of the cases it has been said as an argument against this construction of a maximum rate and the power of the City to regulate rates, that it would be unreasonable to suppose that parties, investors in such plant, would be willing to venture their means subject to such conditions, but the easy answer to such argument is, that such investors are at liberty to accept or reject a franchise of this sort offered by the State or a municipality, and if they accept it upon the terms of such offer, it becomes a contract by the terms and conditions and limitations of which they must abide. Parties who voluntarily enter into a contract, knowing its conditions, have no right to complain of its hardships. The State or the municipality offers franchises upon certain conditions. No person is compelled to accept them upon those conditions, but whoever accepts them must faithfully comply with the terms and conditions of their contract.

It may be remarked that it would be no more injudicious and unwise for the investors in this case to risk their capital in an enterprise which is subject to public control, than it would be for a City to place its inhabitants at the mercy of a private corporation, and especially of a corporation whose nature and business gives it a monopoly, and frees it from competition. The power of regulation is not an arbitrary one, but must be exercised in

a just and reasonable manner, and the Courts will compel this to be done. As much cannot be said of the arbitrary action of a private corporation protected by an irrevocable contract, relieving it from regulation by public authorities.

The Supreme Court of the State has sustained the construction of this contract here contended for in an elaborate opinion, which will be found in the record. This opinion is in accord with the State and Federal cases, some of which will be reviewed in this connection.

In *Ragan vs. Buffat, 9 Lea. 600*, the Supreme Court of Tennessee held that a railroad company was not exempt from regulation of its rates by a provision in its charter "that the charge for transportation and conveyance shall not exceed 35 cents per 100 pounds of heavy articles, and 10 cents per cubic foot on articles of measureme for 100 miles, and 5 cents a mile for passengers." The railroad company sought in that case to avoid the effect of a statute, subsequently enacted, regulating rates, upon the ground that said provision in its charter constituted a contract, the obligation of which could not be violated for the rates therein stipulated. The Court said: "We are of opinion that no such intent appears in the language of our statute; that the object was to fix a maximum charge, beyond which the companies could not go, and to leave the tariff of charges within that limit to the companies, subject to the rules of the common law and the regulating powers of the Courts and the Legislature." This case was decided in 1882, the year in which the Water Company obtained its charter, and has never since been questioned.

The clause of the Railroad Company's charter construed in that case is one that is common to the railroads of Tennessee. Since that opinion was rendered the Legislature of Tennessee has created a Railroad Commission for the regulation of the rates of railroad companies.

In *Ga. R. R. & Banking Co. vs. Smith, 128 U. S., 174; 32 Lawyer's Edition, 378*, the Railroad contested the right of the State of Georgia, through its Railroad Commision, to regulate and reduce its rates by an Act passed subsequent to the granting of

its charter, by reason of the provision in its charter, constituting, as it insisted, a contract, which would be thereby violated by the statute, "that the charge for transportation or conveyance shall not exceed 50 cents per 100 pounds on heavy articles and 10 cents per cubic foot on articles of measurement, for every 100 miles, and 5 cents per mile for every passenger."

This Court, Mr. Justice Field rendering the opinion, said: "It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the Legislature had, in 1833, contracted that the Company might, for all time, charge rates for the transportation of persons and property over its lines, up to the limits therein designated."

The Court, after stating that an explicit contract, exempting a corporation from regulation of its rates, would be recognized, adds: "But to effect this result, the exemption must appear by such clear and unmistakable language, that it cannot be reasonably construed consistent with the reservation of the power by the State. There is no such language in the present case."

In *Osborne vs. San Diego Land & Town Co., 178 U. S., 22; 44 Lawyer's Edition, 962*, this Court, Mr. Justice McKenna, delivering the opinion, held that the annual rates first fixed by a water company in a contract providing that the annual rates shall "be fixed by the party of the first part (water company) as allowed by law," did not constitute an irrevocable contract for the rates first fixed, so as to prevent future regulation thereof.

In the case of *Freeport Water Co. vs. Freeport, 180 U. S., 587; 45 Lawyer's Edition, 679*, the contract was much more favorable to the Water Company than that involved in this case. The contest in that case and in the case of *Danville Water Company vs. Danville, 180 U. S., 619; 45 Lawyer's Edition, 696*, determined at the same time, was over the right of the cities of Freeport and Danville to reduce the hydrant rental contracted to be paid by said cities respectively to the water companies during the charter period of their existence, for water to be furnished the city itself. These cases did not involve the question of the regulation of rates

for water furnished to private consumers. This Court was closely divided upon the question involved in those cases, but determined by a majority opinion that the cities had the right to regulate and reduce the hydrant rentals, under the laws of Illinois, under which the water companies had been chartered, authorizing cities and villages to contract with incorporated companies for a supply of water for public use, for a period of thirty years, and likewise to levy a tax upon the taxable property of their inhabitants to pay for this water supply, and likewise to prescribe by ordinance maximum rates and charges for the supply of water furnished, such rates to be just and reasonable.

The difference between that case and the one at bar is palpable. The Illinois statutes authorized only the City to contract for water for itself and its inhabitants, and to provide by public taxation to pay for same. The contest in that case was over the power of the City to repudiate its explicit contract to pay stipulated hydrant rentals for water furnished to itself. There was no reservation in the Illinois statutes under which the water companies were chartered, conferring upon cities the express power to regulate the price of water. In all these respects those cases are distinguishable from the one under consideration. It is true that in the case of *Rogers Park Water Company vs. Fergus, 180 U. S., 624; 45 Lawyer's Edition, 702,* the question was between the water company and a private consumer, but this latter case is distinguishable from the one under consideration in all of the above respects, except one, to-wit, that it does not involve the hydrant rental contract.

As sustaining the construction of the contract contended for in this case, see:

R. R. vs. West Va. Trans. Co., 25 West Va., 324.

Ruggles vs. People, 91 Ill., 256.

R. R. vs. People, 95 Ill., 313.

City Gas Light Co. vs. Des Moines, 72 Fed. Rep., 829.

Whatever power of regulation the State possesses it may delegate to a City.

Atty. General vs. Old Colony R. R. Co., 160 Mass., 67.

Stone vs. Pensacola etc. Co., 29 Florida, 623.

And this has been done by the provisions of the Act of 1877, in the fullest possible manner.

The power of regulation is a continuing one, and not exhausted by a single exercise.

Province Bank vs. Billings, 4 Peters, 514.

Freeport Water Co. vs. Freeport, supra.

Rogers Park Water Co. vs. Fergus, supra.

The cases principally relied upon by the Water Company are easily distinguishable from the one under consideration.

In *Detroit vs. Detroit Citizen's Ry. Co., 184 U. S., 368; 46 Lawyer's Edition, 492,* the right of the City of Detroit to reduce the rates of fare of a street railway company by ordinance, below the rates that had been agreed upon by the City and the railway company, was denied, upon the ground that such ordinance violated the obligation of the contract between the City and the railway company.

The statutes of Michigan, under which the railway company was chartered, and by authority of which its contract with the City was made and its plant constructed, provided, in substance, that street railways might be constructed in cities, by consent of the corporate authorities, under such rules, regulations and conditions as should be prescribed by ordinance, as a condition to the granting of consent by the City; that after such consent had been given and accepted by the railway company the city should not have any power to revoke the same, or deprive the company of the rights and privileges so conferred, and further, that "the rates of fare which a street railway company may charge for the transportation of persons and passengers over the road, shall be established by agreement between such companies and the corporate authorities of the city or village where the road is located, and shall not be increased without the consent of such authorities."

By contract between the railway company, effected by ordinance, assented to by the company, it is provided that "the rate of fare for any distance shall not exceed 5 cents in any one car,

or on any one route named in this ordinance, except where cars or carriages shall be chartered for special purposes," etc.

In that case, it will be observed that the only contract authorized was between the Street Railway Company and the City. The statutes contemplated that the matter of rates should be a matter of contract, and that the city should make the contract for the inhabitants and thus protect them.

In distinguishing this case from that of *Ga. R. R. & Banking Co. vs. Smith, supra,* the Court said: "In the case at bar, however, the rates are fixed under the provisions of a statute, which declares that they shall be so fixed by agreement between the parties."

The statutes involved in that case clearly contemplated the making of an irrevocable contract between the city and the railway company. It was provided that the city should have no power of revocation. It was held that the rules, regulations and conditions which the city was authorized to impose upon granting consent did not embrace regulation of rates.

It is stated as a matter of some consequence that the city had acquiesced for thirty-three years in the contention of the railway company, without any offer on its part to exercise the power of regulation. These and other features distinguish that case from the one at bar. Here there is an express provision that the police powers of the City shall not be interfered with by the granting of the City's leave to the Water Company. To this an affirmative provision is added granting the City the express power to regulate the price of water. Here the Water Company is not only authorized to deal with the City, but with individual consumers, and hence the importance of reserving to the City the right to regulate the rates that might be demanded of individual consumers by the Water Company.

In *Los Angeles vs. Los Angeles City Water Co., 177 U. S., 558; 44 Lawyer's Edition, 886,* it was conceded that the City had the right to regulate the rates of the Water Company, but a limit or minimum was placed upon that right of regulation. That was a stipulation by the City. The stipulation in this case is for a

maximum and by the Water Company. The stipulation in that case is one that would have been perhaps enforced by the Courts under their power to prevent unreasonable, oppressive or confiscatory rates, even if no contract had existed. The contract entered into in that case was ratified and confirmed by legislative authority. It was held that such a contract could not be violated by subsequent action of the public authorities.

In the case of *Old Colony Trust Co. vs. Atlanta, 83 Fed. Rep., 39*, it was simply held that the City of Atlanta had not been invested with the power to regulate street car fares, and therefore its action was unauthorized and void. It will be found on an examination of the cases, that none of them are in conflict with the City's contention in this case.

But whatever may have been the capacity of the parties to contract, and whatever may have been the contract entered into by them, such contract as was made was revocable, at the will and pleasure of the Legislature, or by the municipality, under the provision of the constitution and laws of the State, as well as by the terms of the Water Company's charter. The power to revoke or annul the contract, being the greater, includes the power necessarily to make reasonable regulation of rates, and the exercise of the power of regulation cannot therefore operate to divest the Water Company of any vested right. Its right is to charge reasonable rates, and it is the right of the State to exact reasonable rates. The general incorporation statute of the State, as well as the Constitution of 1870, provides that all charters shall be subject to modification, amendment or repeal. The Water Company's charter contains the clause on its face that "the right is reserved to repeal, annul or modify this charter."

Record, p. 53.

In *Ferguson vs. Bank, 3 Sneed, 628-9*, decided in 1856, and prior to any constitutional provision on the subject, the Supreme Court of the State of Tennessee said: "But we consider it equally clear that the Legislature may reserve the right to modify, amend or repeal a charter." (Citing authorities.)

"This reservation then became a part of the contract and the

charter is accepted with that as one of its terms and provisions. This exercise, therefore, of this power to amend or repeal, is no infraction of the contract in such a case, but is in exact conformity to it. The right of the Legislature to insert this form in its charters is not debatable at this day.

"Vested rights must be strongly maintained by the Courts, as against the Legislature and all other authorities. The safety of every man's rights of all kinds depends upon a firm adherence to this principle, and the least departure from it would be just cause for alarm. But what are the rights of men or corporations and the rules of construing, their contracts must also be regulated by the rules of law. A contract of any kind with various provisions must be taken as a whole, and all its terms are to have equal vigor, according to the meaning and intent of the parties."

This power to repeal, annul or modify charters has been very generally reserved in the legislation of the States granting charters, whether by special or general laws, since the decision of the Dartmouth College case, in 1819. It was suggested in the opinion Mr. Justice Story in that case that "when the Legislature was enacting a charter for a corporation, a provision in the statute reserving to the Legislafure the right to amend or repeal it, *must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract and could not therefore impair its obligation.*"

In *Greenwood vs. Union Freight R. R. Co., 105 U. S., 13-24: 26 Lawyer's Edition, 965,* Mr. Justice Miller, after quoting this language with approval, says: "This history of the reservation clause in Acts of incorporation supports our proposition that whatever right, franchise or power in a corporation depends for its existence upon the granting clause of a charter, is lost by its repeal." He cites numerous cases in support of this proposition.

It has been held that the power to alter or modify is a continuing one, not exhausted by one alteration or exercise.

R. R. Co. vs. Commissioners, 27 N. J., 228.
People vs. Hills, 46 Barbara, 340.
Proprietors vs. Haskel, 7 Maine 474.

Under statutory provisions authorizing the repeal, amendment or modification of charters, there have been numerous decisions of the State and Federal Courts.

"A statute regulating the rates of a railroad company is within the reserve power to alter its charter."

Capital City Gas Light Co. vs. Des Moines, 72 Federal Reporter, p. 829.

American Coal Co. vs. Consolidated Coal Co., 46 Md., 15.

Shields vs. State, 26 Ohio State Rep., 86. Affirmed in 95 U. S., 319. 24 Lawyer's Edition, 357.

R. R. vs. Ryan, 56 Ark., 245.

"And the Legislature, under the power reserved in a railroad charter to at any time hereafter alter, modify or repeal this Act, has the right to fix the rates of fares which may be charged by such company, without being subject to the charge of impairing the obligation of contract."

Beardsley vs. R. R. Co., 15 App. Div., (N. Y.) 251.

"Where the charter of a railroad company empowers it to exact tolls, at its discretion, an Act of the Legislature restricting the rates that may be taken, is an alteration of the charter within the scope of a reservation of power to alter or repeal."

Atty. General vs. R. R. Co., 35 Wis., 425.

In a note to *Greenwood vs. Union St. Ry. Co., supra,* numerous cases are cited for the proposition that, if the power is reserved, the Legislature may repeal, alter, or modify a charter by a general statute, or it may be done by a change in the constitution, and a creditor cannot object, nor is the consent of the corporation necessary. This reserve power of the State may be exercised, either by the State direct or through such instrumentalities as commissions or municipalities.

"Where a power is reserved to alter a charter, the State may prescribe the manner of the exercise of such a power."

In Re Reciprocity, 22 N. Y., 9. 29 Barber, 369. 17 Howard Pr., 323.

"A statute empowering city councils to regulate the price to be charged for gas may constitute a valid exercise of the power to alter the charter of a gas company."

State Ex Rel. vs. Cincinnati Gas Light & Coke Co., 18 Ohio State Reports, p. 262.

"An Act creating a State Corporation Commission and giving it the right to regulate railroad rates, is an exercise of the reserve power to amend or repeal the charter of a railroad company, giving it the exclusive right to regulate rates or charges."

Matthews vs. Corporation Commissioners, 97 Fed. Rep., 400.

"Charter power to demand such sums as a corporation may deem reasonable for carrying freight and passengers, provided they are reasonable, does not preclude the Legislature from afterwards fixing the maximum of charges, even though there is no reservation of power to alter or repeal the charter."

R. R. Co. vs. Transportation Co., 25 West Va., 324.

"An implied restriction that the corporation, in fixing the rates of toll, shall make them reasonable, is held to exist in a charter giving the power to the corporation to fix its own rates, therefore the Legislature has the same power to say what are reasonable maximum charges as if the charter was silent on that point."

Ruggles vs. People, 91 Ill., 256.
R. R. Co. vs. People, 95 Ill., 313.

"So a contract right of a gas company by its charter to charge and collect reasonable rates is not impaired by a delegation of authority to the City to fix reasonable prices for gas."

Gas Light Co. vs. Des Moines, 72 Fed. Rep., 829.

From these decisions it seems to follow as a necessary result that the State had, under its reserve power to repeal or modify this Water Company's charter, a clear right to regulate its rates in a reasonable manner. The State likewise had the right to delegate this power to a municipality and exercise it in that manner. In fact it is the usual method of exercising the power of regulation to delegate it to Boards and municipalities. See also:

Railroad vs. Adams, 180 U. S., 1.
Bank vs. Owenboro, 173 U. S., 636.

The existence of this power of repeal, and hence of regulation, is declared on the face of the Water Company's charter, and its

delegation to the City is made in explicit language in the charter Act, and is a condition of the very existence of the Water Company. This reserve power, therefore, became a part and condition not only of the charter contract between the State and the Water Company, but of any and every contract entered into by the City and the Water Company. The right of the City to regulate the charges to consumers of water to be furnished to them by this Water Company is a matter of serious consequence to the City and its inhabitants. The City claims only the power of reasonable regulation. It is not denied in this record that the regulation made by the ordinance assailed was reasonable. The highest of the present rates of the Water Company are only one-half of the maximum amount that it was authorized to charge under the original contract of 1882.

If the Water Company's insistence that it is free from regulation under the maximum fixed by that contract is correct, then if its rates are to be controlled by that contract, it may double its present rates. Not only so, but whatever conditions may occur in the future, and however much its revenue may increase, by reason of increase in population and of services, it will be free from any power on the part of the City to compel it to charge reasonable rates.

If the power of regulation exists on the part of the City, it cannot be abused, or arbitrarily or unreasonably exercised. If such attempt is made the Courts will intervene.

(2) The contention that the ordinance of March 30, 1901, operates to deprive the Water Company of its property or other vested right, without due process of law, is well answered by the opinion of the Supreme Court of the State.

The position that the rates fixed by that ordinance were unreasonable, oppressive and confiscatory, was abandoned before the State Court. This is a concession for the purposes of this case that the rates in question are reasonable. It is admitted in the briefs of counsel that the reductions were "small" or "slight." The City exercised its power with moderation. There is no proof that the City did not give the Water Company notice and a hearing be-

fore passing the ordinance. And none that the City did not make proper investigation. But this matter is not material, inasmuch as the Water Company has the right, after the ordinance goes into effect, or even before, to have the reasonableness of the rates investigated, and passed upon by the Courts. After presenting that question in this case by the pleadings, it was abandoned in the proof.

The contention that the ordinance affected the contracts of the Water Company with its consumers is without foundation. The contract with the consumer involved in this case is dated September 1, 1896, and under the rules and regulations of the Water Company ran for one year and was then subject to termination at the option of the consumer. Besides, upon its face, the Water Company reserves the power to practically annul the contract at its own pleasure, by any new rules or regulations that it might adopt. Most of these questions were raised and passed upon by this Court, adversely to the contention of the Water Company, in the case of *Freeport Water Co. vs. Freeport, supra.*

The objection that the City is judge in its own case in the regulation of water rates, is easily met. In the absence of any contract the power of the State to regulate, and the power of the City to whom the right to regulate is delegated, is unquestionable. It is a part of the contract in this case that the City should be arbitrator in this matter. The right to regulate is not only not bargained away, but expressly reserved and expressly conferred upon the City. The Water Company was under no obligation to accept its franchise upon these terms, but, having done so, it has no right to complain. The City has been exceedingly considerate and moderate in its exercise of this power. Its reduction of the rates agreed by the Water Company to be reasonable, and fixed by itself six years ago, is "slight" or "small," by the admission of its counsel. The City has not undertaken to regulate the hydrant rental rates at all, but merely to regulate the rates between the Water Company and private consumers. The question is between the regulation or establishment of rates by the City or by the

Water Company's Directory. It would seem that the public authorities could be as well trusted in this matter as the Directory of the Water Company.

J. W. CULTON,
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PICKLE & TURNER, *of Counsel.*

Geo. W. Pickle.

APPENDIX "A"

1. The City of Knoxville was incorporated by an Act of the Legislature, passed October 27, 1815. This Act contained no provision bearing upon the question of water supply for said City.

2. By an amendment of this Act, passed January 19, 1838, the following provisions, and none other, were made in reference to the question of water supply for said City:

"SEC. 3. Be it enacted, that the Mayor and Aldermen of said Corporation be, and they are hereby authorized to borrow a sum of money, not exceeding fifty thousand dollars, for the purpose of erecting waterworks and supplying said town with water; and the Mayor and Aldermen are hereby authorized to make and issue bonds and script of said corporation for the payment of said sum of money.

"SEC. 4. Be it enacted, that the Mayor and Aldermen of said corporation shall have power and authority to protect from injury by adequate penalties to be imposed by the laws or ordinances of the said Mayor and Aldermen, the pipes, hydrants, or fixtures, buildings or improvements belonging to or in any wise appertaining to said waterworks, whether within or without the limits of said corporation.

'SEC. 5. Be it enacted, that if any person or persons shall wilfully or maliciously cut, destroy or injure in any way whatever, the pipes, hydrants, or fixtures, buildings or improvements belonging to or in any wise appertaining to said waterworks, whether within or without the corporate limits of said corporation, in addition to the penaltes that he, she or they may be liable to under the provisions of the fourth section of this Act, he, she, or they shall be further liable to indictment or presentment in said Mayor's Court, and on conviction of said offense, shall be fined in a sum not less than five nor more than fifty dollars, and imprisoned not exceeding six months."

3. By another amendment of the charter of said City, passed December 7, 1866, the following provision was made:

"SEC. 1. Be it enacted by the General Assembly of the State of Tennessee, that the Mayor and Aldermen of the City of Knoxville shall have and exercise all of the rights, powers, authorities and privileges which have heretofore been conferred by law upon the City of Nashville."

It will be observed that this last amendment gave to the City of Knoxville all of the rights, powers, authorities and privileges which had been conferred upon the City of Nashville.

4. The City of Nashville was incorporated by an Act passed January 31, 1848, found in the Session Acts of 1847-8, Ch. 68, pages 266-71.

The provisions of this Act relating to the question of water supply was as follows: Sec. 1 of the Act authorized the City, among other things, to "receive and hold property, real and personal, beyond the limits of the City, to be used for the burial of the dead, for the erection of waterworks, for the establishment of a hospital, for a poor house, workhouse, or house of correction," etc.

Sec. 6 of the Act, which defines in 37 sub-sections the powers of the City, provides as follows: Sub.-Sec. 8: "To provide the City with water by waterworks, within or beyond the boundaries of the City." Sub-Sec. 24: "To provide for the prevention and extinguishment of fires, to organize and establish fire companies," etc.

Section 8 of the Act provides that the General Assembly "may at any time alter, amend, or repeal this charter."

There are no other provisions in this Act on the subject of waterworks or water supply.

The City of Nashville was re-incorporated by an Act passed February 18, 1858, being Ch. 69 of the Session Acts of 1857-8, Sections 12-17 inclusive.

Sec. 12 of this Act provides that said City "may purchase, receive and hold property, real and personal, beyond the limits of the City, to be used for the burial of the dead, for the erection of waterworks," etc.

There is no other provision in this or any other Act granting or amending the charter of the City of Nashville, passed prior to the Act of 1866, above quoted, by which the City of Knoxville was invested with the rights, powers, authorities and privileges of the City of Nashville.

5. By an Act passed June 10, 1885, being Ch. 8 of the

Session Acts of an extra session of that year, all the Acts chartering the City of Knoxville were incorporated into one statute, and amended:

Sec. 2 of this Act provides that the City "may purchase, receive and hold property, real and personal, within or beyond the limits of the City to be used for the burial of the dead, for the erection of waterworks," etc.

Sec. 18 of this Act defines the powers of the corporation in numerous sub-sections.

Sub-Sec. 7 reads as follows: "To provide the City with water by waterworks, within or beyond the boundaries of the City, or provide for supplying the City with water otherwise, and to provide for the prevention and extinguishment of fires, and to organize and establish fire companies."

Sub-Sec. 29. reads: "To grant a right of way through the streets, avenues, and squares of said City for the purpose of street or other railroads, and for such other purposes as the Board of Mayor and Aldermen may provide by ordinance, provided the Board of Mayor and Aldermen shall not grant the exclusive right to the use of the streets, for any purpose, to any one person, company or corporation."

Sub-Sec. 33 reads: "To take and appropriate in the manner hereinafter provided, grounds adjacent to the corporation line for waterworks purposes, for pumping station, reservoir, right of way for water pipes, and a site for a pumping station, upon the payment of damages. To exercise the right conferred by this subsection, the Mayor and City Council shall by ordinance designate the grounds, and instruct the City Attorney to institute proceedings provided for in Secs. 1325-1348 inclusive of the Code of Tennessee; Milligan & Vertrees Code 1549-1572 inclusive."

These are all the provisions of this Act relating to water supply for said City, and there is no other legislation on the subject.

It will be observed that under this legislation the City of Knoxville had no power prior to 1885 to provide for waterworks or water supply in any other manner than by the erection thereof, by the City, and that it had no power since 1885 to grant an exclusive right, if any right at all, to any company to occupy the streets of the City with pipes and mains for the purpose of supplying its inhabitants with water.

APPENDIX "B"

"An Act to empower Water Companies in this State to acquire by purchase or otherwise the property and working franchises of other Water Companies.

"SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, that in all cases where there are two water companies chartered by special law, or under the general laws of this State, in any of the towns or cities of this State, and it becomes necessary or desirable for one of said companies to acquire, by purchase or otherwise, the property and working franchises of the other corporation, in order to enable it to better carry out its duties under its charter and to comply with any contract or contracts which it may have entered into for public and private supply of the city or town in which it is located and the inhabitants thereof, that such corporation shall have, by and with the consent and approval of the municipal authorities in the town or city in which such corporations are located, the power, and is hereby authorized to acquire, by purchase or otherwise, the property and working franchises of such other corporation, including its realty, its pipes, all its connections, its engines, its pumps, and all else that pertains and belongs to such other corporation, as a part of its corporate property, the same to be held, owned, enjoyed, and operated by the purchasing Company under its own charter, just as if it had originaly built or acquired said property under its own charter; provided, that nothing in this Act shall authorize one water company to purchase the corporate property and working franchises of another company when the same are being operated and run in competition with each other.

"SEC. 2. Be it further enacted, that this Act take effect from and after its passage, the public welfare requiring it.

"Passed March 30, 1889."

Session Acts 1889, Chap. 106, p. 316.